

FCC Received March 11 1993 - 2:15 p.m.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In Re:)
)
SCRIPPS HOWARD BROADCASTING)
COMPANY, et al.)
)
Baltimore, Maryland)
-----)

MM Docket No. 93-94

The above-entitled matter came on for pre-hearing conference pursuant to notice before Richard L. Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 4, on Tuesday, May 4, 1993, at 9:30 a.m.

APPEARANCES:

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25	Conference Began: 9:30 a.m.	Conference Ended: 10:03 a.m.

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P R O C E E D I N G S

(9:30 a.m.)

JUDGE SIPPEL: This is a prehearing conference that was called at my order, 93M-211. I'm going to ask all counsel present to please note their appearances for the record at this time, starting with, in docket order, counsel for Scripps Howard.

MR. HOWARD: I'm Kenneth C. Howard, Jr., Baker and Hostetler.

MR. GREENEBAUM: Leonard C. Greenebaum, Baker and Hostetler.

MR. ROBERTS: David N. Roberts, Baker and Hostetler.

MS. GOSS: Margaret Goss, Baker and Hostetler.

JUDGE SIPPEL: Okay. And is that -- that concludes the appearances for Baker and Hostetler -- Howard -- Scripps Howard. And on behalf of Four Jacks Broadcasting?

MR. LEADER: Martin R. Leader and Kathryn R. Schmeltzer.

JUDGE SIPPEL: And on behalf of the Mass Media Bureau.

MR. GOLDSTEIN: Norman Goldstein and Robert Zauner.

JUDGE SIPPEL: Okay. I have -- the purpose for this conference this morning is for me to consider, to be sure that I'm considering all of the relevant facts and that, and that the counsel and the parties are aware of all the relevant facts with respect to a suggestion that I voluntarily recuse myself from this case as a result of my former association in

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1 a, in a partnership with Sachs, Greenebaum, and Taylor back in
2 -- during the period 1970 to 1975, which Mr. Greenebaum, of
3 course, was a, was a member of that firm and we practiced law
4 together.

5 Let me first require that sometime before the close of
6

1 trying to use this conference for is to be sure that all the
2 relevant facts are on the record. I'm not asking for argument
3 on the issue. The issue, as I see it, is my issue.

4 But I do want to know what the facts are and I want you
5 to know the facts as I see them. From, from where I have been
6 since 1970. You point out, Mr. Leader, that you are
7 uncomfortable that a former law partner would be appearing
8 before me, and this is the language that I want to focus on
9 right -- for this particular point. "Especially since Mr.
10 Greenebaum's involvement in this proceeding seems to be co-
11 terminus with your appointment as the presiding Administrative
12 Law Judge."

13 Now, the record reflects that on April the 2nd, Judge

1 inference that there was some appointment, or assignment of me
2 to this case with any knowledge or consideration of any sort
3 that Mr. Greenebaum might be involved in the case.

4 MR. LEADER: No. The inference was just the opposite.
5 That Mr. Greenebaum's involvement was precipitated by your
6 appointment, not Judge -- Chief Judge Stirmer's appointment of
7 you. This case has been going on for approximately two years.
8 It's going to be two years in June and it wasn't until after
9 you were appointed that Mr. Greenebaum surfaced -- name
10 surfaced and if you review the record you'll see that there
11 have been many pleadings and matters filed in this over a two-
12 year period in which Mr. Greenebaum's name has been -- has not
13 been part of the pleadings which Scripps Howard has, has filed
14 and that's what made me uncomfortable. That's the
15 interpretation that that sentence in the letter should
16 receive.

17 JUDGE SIPPEL: All right. Well, I, I did not mean it
18 when I'm, when I'm reading this into the record, I'm making
19 this comment. I am not trying to read anything into it other
20 than what you've said. I'm just simply trying to be sure that
21 the record and that everybody here and ultimately all the
22 parties understand --

23 MR. LEADER: Well, I just want --

24 JUDGE SIPPEL: -- the situation from this office.
25

1 was not to impugn Chief Judge Stirmer or yourself.

2 JUDGE SIPPEL: I understand. I -- and I, and I do
3 accept that. Now, and as I say, I'm not -- I, I will accept
4 the fact that there are -- that the records -- the pleadings,
5 rather, that are in the record up till this point will speak
6 for themselves. So -- and -- well, let me move on from there.
7 Let me move on --

8 MR. GREENEBAUM: Can we respond to that, Your Honor?

9 JUDGE SIPPEL: Well, if it's a clar-- yes, yes. Go
10 ahead. I mean, again, factually I want to be sure that we're
11 staying to facts now, in terms of what I need to decide. Go
12 ahead, Mr. Greenebaum.

13 MR. GREENEBAUM: I, I believe it is a reckless
14 allegation to suggest that my involvement in the case was
15 merely because you were appointed as the judge. To stick that
16 on the public record in a letter, free of any facts, is
17 reckless in my regard. And I want to assure this court that I
18 have been in this matter from the beginning in our office and
19 there's no connection between your appointment and my
20 appearance and I believe that should be in the record as well.

21 JUDGE SIPPEL: Well, all right. I will, you know, I'll
22 accept that statement as your position, Mr. Greenebaum. I,
23 I'm -- my, my, my comment -- my qualified comment to that, to
24 the extent that you consider that qualified, is not to suggest
25 anything here. I, I want to -- I, I -- this is coming at me

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1 rather fast and I want to just get the facts down, my
2 understanding of it. I want to be sure you know what my facts
3 are that are in my head that pertain to this and then I can
4 reflect on this and make a determination. Mr. Leader.

5 MR. LEADER: Yes. I don't want to -- I don't think
6 that our letter ought to be characterized as a reckless
7 allegation. I think the letter was very clear in saying that
8 we were uncomfortable. I am, I am aware that in the federal
9 court system and in other administrative proceedings, that
10 when matters like this arise the judges are sitting before
11 former law partners, it's not uncommon for the judge to put on
12 the record his relationship with counsel so that the parties
13 -- my client, Mr. Howard's client, are comfortable with the
14 relationship.

15 I mean the last thing that we want -- this, this is --
16 this case has enough issues in it without having to have every
17 issue over-- overlay with whether there was bias. And it
18 seems to me that from Scripps Howard's point of view that your
19 fairness to Four Jacks could be interpreted to the buydown by
20 them as bias on a particular issue or ruling and I just
21 thought that before we became involved in this proceeding,
22 that that issue ought to be ventilated. I, I don't believe
23 that that's a reckless allegation.

24 JUDGE SIPPEL: Well, again --

25 MR. LEADER: I think it's in everyone's interest. I

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1 think it's in Scripps' interest, I think it's in our interest,
2 and I think it's in the interest of the integrity of the
3 administrative process here at the FCC.

4 JUDGE SIPPEL: I, I, I'm trying to avoid getting into
5 altercations between counsel with respect to motives and this
6 type of thing, because it's, it's -- it was -- what I'm trying
7 to do is I'm trying to get as clear a view of the facts as I
8 possibly can.

9 So I'm going to ask both counsel not to -- please,
10 don't use this opportunity to make accusations at one another.
11 If it gets into a motion practice, there'll be opportunity to
12 do that. The -- again, I'm try -- there's so many ways that I
13 can put this in its initial context.

14 When I came to the Commission in 1986, there was a
15 public release that was issued that identified me as once
16 having been a partner at Sachs, Greenebaum and Taylor and I
17 know that my office was getting calls from communications
18 counselor around town asking whether that had been put out.
19 They, they wanted to get some background with respect to this
20 newly appointed Administrative Law Judge.

21 So, I, I'm saying -- I'm not saying that in a -- for
22 any purpose of trying to flatter myself. I'm simply saying
23 that as a factual matter, my relationship with the firm has
24 been a matter of public record since 1986. Now, I have some
25 knowledge with respect to Mr. Greenebaum becoming a member of

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1 Baker and Hostetler through the -- my knowledge of the fact
2 that Sachs, Greenebaum and Taylor disbanded back in, I believe
3 it was, 1990 or 1991. I think I'm in the right time frame.

4 And just, you know, through osmosis talking to people
5 and whatnot, I had gotten wind of the fact that Mr. Greenebaum
6 had gotten over to Baker and Hostetler. I'm assuming that if
7 -- that that also is a matter of public record, that he has
8 been with the firm since, I don't know, since this case began,
9 but certainly for the past couple of years.

10 I'm not sure if that really adds anything to the
11 situation. What I'm saying is is that if anybody wanted to,
12 to, to look for a potential connection, I suppose there would
13 have been enough information on the public record to do that.
14 You would, of course, I would think be thinking, Mr. Leader, I
15 think well, but you didn't -- wouldn't have any occasion to
16 think of that until you received notification from Mr. Howard
17 that Mr. Greenebaum, in fact, had been working on the case.

18 So, again, that brings me back to where I am today, and
19 that is that I want to assure the record that since I left the
20 firm in October of 1975, I have not had occasion to talk to
21 Mr. Greenebaum. My career went off with the Government in
22 October of 1975. It has been there ever since. I spent 18
23 months in the period of '84 to '85 in Pittsburgh,
24 Pennsylvania. I have -- I never revisited the firm.

25 There were some former partners that I did talk to from

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1 time to time, but as far as Mr. Greenebaum and myself is
2 concerned, for whatever reason, happenstance happens. We
3 never had occasion to communicate with one another, either
4 professionally or personally, since I walked out of that firm
5 in October of 1975. I -- like I said, it was a career change
6 for me. So there was no -- then, moving on from that, I
7 became an Administrative Law Judge in 1984. Mr. Greenebaum
8 hasn't ever even known me as a judge. He knew me as a
9 relatively young attorney in a firm that did a lot of
10 litigation.

11 We didn't do communications work. There was not a
12 communications practice in the firm. Mr. Greenebaum, while I
13 was there, to my knowledge never did any communications work
14 and I would have known that. I mean, he never -- that was
15 just not part of what the firm was doing at that time. I
16 should be -- to be sure that I'm fully disclosing everything,
17 we did have a relationship with an ongoing application. The
18 firm was serving as general counsel and secretary to a
19 challenging application in the United TV Broadcasting Company
20 case and I did do some work in that case. Nothing to do with
21 Mr. Greenebaum. Absolutely zero to do with Mr. Greenebaum.

22 And for the last 18 months that I was at the firm, I
23 was engaged, heavily engaged in litigating with another
24 partner, not with Mr. Greenebaum, a heavily litigated case
25 involving a Title VII allegation against a brokerage firm.

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1 And just before I left the firm, I prepared the record on
2 appeal and drafted the brief for the partner that was in
3 charge of that case. So, I mean, in terms of my, my, my
4 relationships with Mr. Greenebaum were more focusing in the
5 beginning of that relationship with Sachs, Greenebaum and
6 Taylor.

7 I had no equity in the firm. When I left the firm, the
8 only thing that was there that was mine was my, was my pro
9 rata interest as in the HR-10 plan. I removed myself and my
10 money from that shortly after I left the firm. And since that
11 time, there's just been absolutely no contacts. Now, we're
12 talking about a period of approximately 20 years.

13 I have no idea and I'm -- as to why Mr. Greenebaum
14 surfaced in this case or at what particular time he surfaced
15 in this case. But, from where I'm sitting, right here now
16 today I don't see it as being a relevant issue. I don't --
17 for whatever reason Mr. Greenebaum is appearing in this case
18 in his -- as it's represented in the letter -- when I say the
19 letter, Mr. Howard's letter -- Mr. Greenebaum and his position
20 as the head of the litigation group.

21 There's been a decision made for Mr. Greenebaum to
22 participate in the case. I don't know when that decision was
23 made or why it was made, but I just -- from my standpoint, in
24 terms of my, my former relationship with Mr. Greenebaum over
25 that period of time, with no intervening contacts, I just -- I

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1 have a hard time seeing a relevancy to it. You wouldn't know
2 that when you wrote me that letter, so -- and I accept that.
3 That's why I wanted to get here this morning and tell you
4 where, where I come from on this.

5 Now, what I have done thus far is I have looked at two
6 provisions of the, of the code, the Model Code of Judicial
7 Conduct is actually one and the -- has one for Administrative
8 Law Judges, but it's actually based on -- almost verbatim on
9 what the Model Code of Judicial Conduct says. And with
10 respect to impartiality and diligence in performance of case
11 work, and I'm focusing on impartiality, it gives a specific
12 example.

13 This is -- I'm sorry. This is, this is Canon III and
14 I, I -- again, I'm not asking for legal arguments on this. I
15 just want to give you the factual context in which I'm viewing
16 this whole issue. And it says, with respect to
17 disqualification, it says that an Administrative Law Judge
18 should disqualify himself or herself in any proceeding in
19 which the judge's impartiality might reasonably be questioned,
20 including but not limited to instances where --

21 And then (a) there's a personal bias or prejudice, and
22 then (b) -- this is, and this is the language which is the
23 most close to this situation, in private practice the judge
24 served as lawyer in the matter in controversy or a lawyer with
25 whom the judge previously practiced law served during such

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1 association as a lawyer concerning the matter, or the judge or
2 such lawyer has been a material witness concerning it.

3 Now, again, I'm not asking everybody to be prepared to
4 parse this language, but my point is is that as I see it -- as
5 I know the facts to be, there is absolutely nothing before
6 this Commission with respect to this case or, as far as I
7 know, anything else that has anything to do with anything that
8 Mr. Greenebaum and I ever worked on together as lawyers.
9 Nothing even remotely connected to that.

10 So, I'm saying is that the illustrations that give --
11 that are used to give caution to judges in terms to how they
12 act in cases under these circumstances, seem to -- are
13 certainly indicating something much closer, a much closer
14 connection than, than, than what's in this case at this point.

15 Now, there, there is also another provision in, in
16 Canon I, so that you know hopefully I'm reading all the
17 relevant ones, which says that a judge should not lend the
18 prestige of the off -- of the office to advance the private
19 interests of others, nor convey or permit others to convey the
20 impression that they are in a special position of influence.

21 Now, I think from what I have explained today in terms
22 of my, my association -- former association with Mr.
23 Greenebaum, that there is nothing that's transpired in this
24 case to convey the impression that Mr. Greenebaum or the firm
25 that he's with, Baker and Hostetler, is in a position, a

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1 | special position of influence with respect to myself.

2 Mr. Leader, if you have some other facts or if there's
3 some other authority that, that leads you to conclude
4 otherwise, please bring it to my attention, but I, I -- by
5 virtue of simply the fact that we were in practice together in
6 the early '70s when I was a young attorney, almost 20 years
7 ago in light of the time frame that we're talking about here,
8 and having had absolutely no contact from Mr. Greenebaum since
9 that time, I don't see anyway in which he could be inferred as
10 having any kind of a special influence with respect to me.

11 Now, let me move on again briefly to what the
12 Commission has held with respect to the Commission standard
13 with respect to justification for a request to disqualify.
14 And, again, from your letter, the language that you use is
15 that you request that -- although you're requesting that I

1 letter you did. I, I'm not trying to put words in your mouth
2 today. But in your letter you were asking me to go beyond
3 that because of circumstances that had come to your attention.

4 Now, I don't think that there's anything more factually
5 that I can bring to this, this question and I'm going to ask
6 everybody here, present, is there anything of an additional
7 factual nature or any other insight. I'm not looking for
8 legal argument. I'm looking for insight -- well, I, I -- let
9 me take that back. If anybody knows of another situation
10 that's like this, factually, where a judge has voluntarily
11 recused himself, I'd be interested to hear that.

12 MR. LEADER: The FCC cases have not involved a
13 situation similar to this. There is no FCC-reported case.
14 The closest case was when Judge Krashauer (phonetic sp.)
15 recused himself from the WHEH-TV in Boston case because while
16 he was a member of the then-hearing division of the Broadcast
17 Bureau, he had written pleadings and therefore he voluntarily
18 stepped aside and Judge Sharkman (phonetic sp.) at the time
19 took over.

20 But there is no case involving a -- an Administrative
21 -- a lawyer or a former partner who appears before a, a -- an
22 Administrative Law Judge. In the federal courts, however,
23 this is a -- in certain areas, a recurring event.

24 JUDGE SIPPEL: Well, as I say, if Sachs, Greenebaum and
25 Taylor as an institution was still in existence today, I don't

1 | know if my outcome would be any different, but I would be
2 | thinking of it in -- with a, with a, with a different --
3 | little different observation -- that is -- and of

1 JUDGE SIPPEL: All right. Mr. Howard.

2 MR. HOWARD: I'd just like to note that my letter did
3 invite Mr. Leader to give me a call on the subject to where we
4 could have discussed this before bringing it into this
5 proceeding and that while he -- his record notes that he was
6 unable to reach me by telephone, the one effort that he made
7 to try to reach me by telephone that I know of, occurred at, I
8 believe, about one o'clock that day when I was in a meeting.

9 I called him as soon as I was out of that meeting,
10 about three o'clock that afternoon, when he -- I had not yet
11 received this, but apparently the letter had already been
12 delivered. So he did not make any significant effort to try
13 to reach me and to perhaps talk to Mr. Greenebaum in advance
14 of bringing this to your attention.

15 JUDGE SIPPEL: Well, I, I am a little disappointed that
16 it wasn't, it wasn't a little bit aired at least between
17 counsel before the correspondence started being circulated,
18 because I think any judge is going to take this -- a question
19 like this extremely seriously.

20 And I am. I mean, I am. And I'm not -- again, I am
21 not ascribing any bad faith to anybody with respect to this
22 happening. It's just an event that just happened and it's
23 going to be taken care of. There is nothing -- I'm, I'm
24 holding no grudges against anybody for this at all.

25 I do want to say, I do want to say two things. I do

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1 think it was -- certainly it was appropriate -- I mean on the
2 positive side, I certainly -- it was, it was most appropriate
3 for Baker and Hostetler to put this matter -- bring it to my
4 attention -- that's -- I'm not sure -- I'm not sure -- I'm not sure

1 respect to my staying in this case if this is going to become
2 a major issue among the parties.

3 MR. LEADER: I don't see how we can tell you right now
4 whether it will or will not be a major issue.

5 JUDGE SIPPEL: Well --

6 MR. LEADER: On either our part or Scripps Howard's
7 part.

8 JUDGE SIPPEL: Well, I can't make you commit to the
9 future either, but I don't see anything -- personally I don't
10 see anything that's brought to my attention right now, which
11 would prompt me to think that it's going to go beyond this. I
12 mean, I just don't see it. Does anybody see it any
13 differently? Mr. Howard? Mr. Greenebaum?

14 MR. HOWARD: No, Your Honor.

15 JUDGE SIPPEL: All right. I, I say, I'm not asking for
16 a promise in blood that it will never arise again in this
17 case, but I see no reasonable concern that it's going to
18 resurrect itself or this is going to become, this is going to
19 become the issue of battle, so to speak. I don't think that I
20 have anything more at this time. Does the Bureau have
21 anything that they wish to add or comment with respect to
22 this?

23 MR. GOLDSTEIN: No. I would just say that I think it
24 was not inappropriate for Fisher Wayland to raise the
25 question, bring it to your attention. I think it's

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1 appropriate for you to air these situations and I'm sure we'll
2 be satisfied with the resolution of it.

3 JUDGE SIPPEL: All right. All right. Well, I'm going
4 to -- certainly within 24 hours I'm going to make a decision
5 on this. I, I -- and I want to -- I'm going to leave here
6 with the understanding that I have all of the relevant facts
7 that I need to, to resolve it. And, I, I, you know, that's
8 all I can ask for. Anybody have anything more?

9 MR. HOWARD: Your Honor, it is --

10 JUDGE SIPPEL: Mr. Howard?

11 MR. HOWARD: Mr. Greenebaum suggests that we do note to
12 you that -- just a date for when he started acting on the, the
13 matter and I'd just like to read it into the record. I think
14 -- in fact his participation began earlier than this, but I
15 have looked back to note that as of April 15th, 1992, he
16 started participating.

17 JUDGE SIPPEL: April 15th of 1992. All right. So
18 that's about a -- that's a little bit better than a year ago.

19 MR. GOLDSTEIN: And we're safe to assume there's
20 documentary evidence to that effect?

21 MR. HOWARD: There is documentary evidence.

22 JUDGE SIPPEL: Is there -- while we're still here on
23 the issue, Mr. Greenebaum did earlier indicate a willingness
24 to, to disclose them. Did, did I hear you right, sir?

25 MR. GREENEBAUM: Your Honor, I -- and I apologize for

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1 | it, but I take it no less serious than you do and I felt like
2 | my integrity was being attacked and I would like to eliminate
3 | that issue and I am prepared to satisfy counsel that my
4 | involvement started when this matter started in the office.

1 Greenebaum up on that or not? I --

2 MR. LEADER: I don't think that's the issue, you know.
3 The issue is the end -- it, it, it is -- I think it was a
4 fair, fair observation. I mean the issue at, at the end of
5 the proceeding is going to be whether or not there is a
6 perception of bias. And whether both parties felt they were
7 treated fairly and that, that goes as well with Scripps. They
8 may feel you've bent over backwards to demonstrate your
9 fairness by making certain rulings that favor Four Jacks.

10 And, and that, to me, is going to permeate the
11 proceeding and I just felt, as an advocate for client, that I
12 was bound to bring that to the attention of the trier of fact
13 and I've done that. I, I, I'm not the decision maker, but I
14 have discharged my professional responsibility as far as I'm
15 concerned.

16 JUDGE SIPPEL: Well, I see -- in terms of what you've
17 done and in terms of what Baker and Hostetler have done, I've
18 seen absolutely no -- I'm taking this as no -- there's been no
19 impropriety from my standpoint. I mean, you know, you know it
20 as well as I do, but I mean, I want you -- to let you know
21 from my perception this is a circumstance that just happened
22 to be with the case when I was assigned to the case and it's
23 been handled in a professional way, as far as I'm concerned,
24 and you'll get an answer within 24 hours as to whether it's me
25 or somebody else. All right? That's it then. The case is in

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1 recess. Thank you.

2 (Whereupon, at 10:05 a.m., the proceeding was adjourned.)

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